

学校编码: 10384

分类号_____密级_____

学号: 12020051402820

UDC_____

厦门大学

博士学位论文

阿根廷国际投资仲裁危机的法理与实践研究
——兼论对中国的启示

A Legal Research on the Crisis of Argentine International
Investment Arbitration
——Lessons China can Learn

刘京莲

指导教师姓名: 陈安 教授

专业名称: 国际法学

论文提交日期: 2008 年 8 月

论文答辩时间: 2008 年 月

学位授予日期: 2008 年 月

答辩委员会主席:_____

评阅人:_____

2008 年 8 月

阿根廷国际投资仲裁危机的法理与实践研究

刘京莲

指导教师: 陈安教授

厦门大学

厦门大学学位论文原创性声明

本人呈交的学位论文是本人在导师指导下,独立完成的研究成果。本人在论文写作中参考其他个人或集体已经发表的研究成果,均在文中以适当方式明确标明,并符合法律规范和《厦门大学研究生学术活动规范(试行)》。

另外,该学位论文为()课题(组)的研究成果,获得()课题(组)经费或实验室的资助,在()实验室完成。(请在以上括号内填写课题或课题组负责人或实验室名称,未有此项声明内容的,可以不作特别声明。)

声明人(签名):
年 月 日

厦门大学学位论文著作权使用声明

本人同意厦门大学根据《中华人民共和国学位条例暂行实施办法》等规定保留和使用此学位论文，并向主管部门或其指定机构送交学位论文（包括纸质版和电子版），允许学位论文进入厦门大学图书馆及其数据库被查阅、借阅。本人同意厦门大学将学位论文加入全国博士、硕士学位论文共建单位数据库进行检索，将学位论文的标题和摘要汇编出版，采用影印、缩印或者其它方式合理复制学位论文。

本学位论文属于：

（ ） 1. 经厦门大学保密委员会审查核定的保密学位论文，
于 年 月 日解密，解密后适用上述授权。

（ ） 2. 不保密，适用上述授权。

（请在以上相应括号内打“√”或填上相应内容。保密学位论文应是已经厦门大学保密委员会审定过的学位论文，未经厦门大学保密委员会审定的学位论文均为公开学位论文。此声明栏不填写的，默认为公开学位论文，均适用上述授权。）

声明人（签名）：

年 月 日

厦门大学博硕士论文摘要库

内 容 摘 要

2001 年底至 2002 年初阿根廷却经历了历史上最为严重的经济危机。为了缓解危机的冲击, 阿根廷政府宣布全国进入“紧急状态”, 国会颁布《公共紧急状态法》。阿根廷实施上述措施一方面促使了阿根廷经济的复苏, 另一方面使参与阿根廷私有化进程的外国投资者遭受了巨额损失。为了挽回损失, 众多外国投资者向国际投资仲裁庭提起了以阿根廷为被申请人的国际投资仲裁申请。截止到 2008 年 8 月, 仅在 ICSID 体制内阿根廷便涉案 47 起, 且这些案件多半与阿根廷经济危机有关。在已经做出终局裁决的案件中, 阿根廷多以失败而告终。阿根廷现象在 ICSID 体制内前所未有, 即使在整个国际投资仲裁历史上也属罕见。

因此, 本文以阿根廷国际投资仲裁危机作为研究对象, 探讨阿根廷国际投资仲裁危机的背景、原因以及阿根廷在国际层面和国内层面的应对措施。通过考察, 本文指出阿根廷经济危机是阿根廷国际投资仲裁危机的直接原因, 阿根廷国际投资法律自由化改革是阿根廷国际投资仲裁危机的根本原因。20 世纪 90 年代末期, 阿根廷签订的双边投资条约背弃了卡尔沃主义, 完全接受了国际投资仲裁机构的管辖权, 并给予外国投资者高标准的保护。正是阿根廷双边投资条约过于自由化的规定导致阿根廷在国际层面的抗辩多以失败告终。阿根廷试图通过国内司法审查的方式否定仲裁裁决在阿根廷国内的执行又蕴含着极大的危险, 这种救济方式将导致阿根廷违背《ICSID 公约》的规定, 损害阿根廷在国际商业社会的声誉。

中国与阿根廷同属于发展中国家, 都面临着大力发展本国经济的重任。为了改善中国的投资环境, 中国双边投资条约也出现了自由化的趋势。虽然目前在 ICSID 体制内尚未出现以中国为被申请人的案件, 但是这种可能性并非不存在。中国应当未雨绸缪, 吸取阿根廷国际投资仲裁危机的教训, 修改中国双边投资条约的规定, 平衡投资者的财产利益与东道国主权权利, 防止中国重蹈阿根廷的覆辙。

除前言与结论外, 本论文共分为六章。

第一章首先对阿根廷国际投资仲裁危机作出概要介绍。本章主要涉及三个问题, 即国际投资仲裁的基本理论问题、阿根廷国际投资仲裁涉案情况和阿根廷国

际投资仲裁危机的社会经济背景分析。

第二章对阿根廷国际投资仲裁危机作出了法理分析。本章主要涉及阿根廷国内投资法律体制的自由化改革。在本章中，笔者将首先对卡尔沃主义进行历史回顾，并对阿根廷传统国际投资法对卡尔沃主义的坚持作出介绍。然后笔者将对阿根廷国际投资法制自由化改革作出介绍与评价，指出阿根廷国际投资法制对卡尔沃主义的背弃构成了阿根廷国际投资仲裁危机深层次的国内法原因。

第三章对阿根廷国际投资仲裁危机作出了进一步的法理分析。文章首先对阿根廷双边投资条约的程序条款做出分析，指出阿根廷双边投资条约完全接受了ICSID的仲裁管辖权，背弃了卡尔沃主义。其次对阿根廷双边投资条约的实体条款做出分析，指出阿根廷双边投资条约赋予投资者高标准的保护。正是阿根廷双边投资条约过于自由化的规定导致阿根廷在国际投资仲裁危机面前捉襟见肘，应对无门。

第四章对阿根廷国际投资仲裁危机在国际层面的应对措施作出了实证考察。文章在分析了阿根廷的主要抗辩理由后指出阿根廷在国际仲裁庭抗辩的失败归结于阿根廷双边投资条约的规定。文章同时指出国际投资仲裁规则的缺陷对阿根廷仲裁案件也产生了不利影响。

第五章对阿根廷国际投资仲裁危机国内层面的应对措施作出了实证考察。阿根廷官员和学者对ICSID体制提出严厉的批评，并试图采取措施阻止仲裁裁决在阿根廷国内的执行。阿根廷最高法院也通过判例表明，任何不合宪、不合法、不合理的仲裁裁决均须受到阿根廷国内法院的审查。在对上述措施进行考察以后，本文指出阿根廷国内应对措施面临巨大的风险。

第六章在分析阿根廷国际仲裁危机的基础上对中国双边投资条约缔约实践作出分析与评价，并提出修改中国双边投资条约的意见，寻求投资者财产利益保护与东道国主权权利行使的平衡。

关键词： 阿根廷；投资仲裁危机；启示意义

ABSTRACT

Argentina was one of the richest countries in the world in the early 20's century. Argentina experienced a very serious economic crisis from the late 2001 to the early 2002. In order to alleviate the effect of the crisis, the government announced that Argentina was in a state of emergency, the parliament promulgated the law of emergency. The actions taken prevented the breakdown of the economy, meanwhile the foreign investors suffered tremendous economic losses. So many foreign investors filed the request for arbitration against the Argentina Republic with the International Centre for Settlement of Investment Disputes (ICSID). Up to the 20 August 2008, there are 47 cases against Argentina in the ICSID, most of which related to the economic crisis. In most of the cases concluded, Argentina was defeated. Thus Argentina experiences another serious crisis in the field of international investment arbitration. The phenomenon of Argentina is unprecedented in the history of ICSID and in the history of international investment arbitration.

The subject of the dissertation is the crisis experienced by Argentina in the field of international investment arbitration. The dissertation will introduce the background of the crisis, trying to find out the reasons, discussing the measures Argentina taken in the international arbitral tribunals, the means will be taken in the courts of Argentina. The dissertation points out that the economic crisis directly caused the international investment arbitration crisis and the investment law reformation constitutes the basic reason. In the late 1990, Argentina signed lots of Bilateral Investment Treaties (BITs), which abandoned the Calvo Doctrine, accepted the jurisdiction of ICSID, and accorded the foreign investors high level protection. It is the BITs that caused the failure of Argentina in most of the cases. Trying to review the awards and denying them in the courts of Argentina is very unadvisable, which will lead Argentina to breach its international treaty obligation and will do harm to Argentina's reputation in the international business society.

Just like Argentina, China is a developing country. The primary task of China is to stimulate the development of the economy. In order to improve the investment environment, China has changed its attitude to the BIT, giving the foreign investor

high level protection. Despite now there are no cases against China in ICSID, China should make ready for it. China should amend the regulations of the BITs; balance the protection to the investors and the host state, thus avoiding the crisis.

Besides preamble and conclusion, the dissertation comprises six chapters.

Chapter 1 introduces the Argentina's international investment crisis briefly, which composed of three parts. Part 1 introduces the fundamental theory of international investment arbitration. Part 2 gives out the cases now Argentina facing. Part 3 discusses the background of the crisis.

Chapter 2 analyzes the jurisprudential reason of the crisis. Firstly, the dissertation explicates the history and the meaning of Calvo Doctrine, finds out that Calvo Doctrine is the most powerful weapon that the developing countries could use to oppose the jurisdiction of international arbitration tribunal. Then the dissertation points out that Argentina abandoned the Calvo Doctrine when it signed the BITs, which caused the crisis.

Chapter 3 analyzes another jurisprudential reason of the crisis. According to the BITs, Argentina accepted the jurisdiction of the international arbitration tribunals; meanwhile Argentina granted the foreign investors high level protection. It is the regulations of the BITs caused the crisis.

Chapter 4 reviews the objections of Argentina to the cases in ICSID. The dissertation explicates and appraises the objections to the jurisdiction and to the merits, pointing out that the regulations of the Argentina's BITs caused the failure. The defects of international arbitration process aggravated the situation.

Chapter 5 reviews the measures Argentina will take in its own country. Because the awards released contradicted each other, Argentine officials and scholars sternly criticized the ICSID system. The supreme court of Argentina also said that any awards that are unconstitutional, illegal or unreasonable must be reviewed by the Argentine courts. After analyzing the measures above, the dissertation indicates that it is unadvisable for Argentina to take such measures.

Chapter 6 compares the Bilateral Investment Treaties signed by China with that of Argentina, putting forward the suggestions to perfect the BIT of China to prevent China from experiencing such crisis.

Key Words: Argentina; International Investment Arbitration Crisis; instruction

目 录

前 言	1
一、研究背景	1
二、研究对象	3
三、研究现状	4
四、研究意义	6
五、研究方法	7
六、体例安排和基本内容	8
第一章 阿根廷国际投资仲裁危机概述	11
第一节 国际投资争端解决机制	11
一、外交保护	12
二、国家间投资仲裁	13
三、国际商事仲裁	13
四、国际投资仲裁	15
五、小结	16
第二节 阿根廷国际投资仲裁危机	16
一、阿根廷经济危机	16
二、阿根廷国际投资仲裁危机	17
三、小结	23
第三节 阿根廷国际投资仲裁危机社会经济背景分析	23
一、阿根廷谜题	23
二、初级产品出口型发展模式	24
三、进口替代工业化发展模式	26
四、经济自由化发展模式	30
本章小结	35
第二章 阿根廷国际投资仲裁危机的法理(一): 阿根廷投资	

法制研究	37
第一节 卡尔沃主义基本原理	37
一、卡尔沃主义兴起的背景.....	38
二、卡尔沃主义的基本内涵.....	41
三、卡尔沃条款的效力.....	43
四、小结.....	45
第二节 阿根廷国际投资法制	46
一、二十世纪初阿根廷投资法.....	46
二、庇隆政府时期阿根廷投资法.....	47
三、二十世纪后期阿根廷国际投资法.....	48
四、小结.....	53
本章小结	53
第三章 阿根廷国际投资仲裁危机的法理（二）：阿根廷 BIT	
研究	55
第一节 阿根廷 BIT 程序规则	55
一、管辖权条款.....	55
二、当地救济条款.....	61
三、国际投资仲裁程序正当性危机.....	65
四、小结.....	70
第二节 阿根廷 BIT 实体规则	71
一、条约序言.....	71
二、投资定义条款.....	73
三、投资待遇条款.....	75
四、征收条款.....	79
五、例外条款.....	81
本章小结	83
第四章 阿根廷国际投资仲裁危机的实践（一）：国际法应对	
措施分析	84

第一节 程序抗辩	84
一、管辖权抗辩	84
二、仲裁员异议	93
第二节 实体抗辩	102
一、有关间接征收条款的抗辩	103
二、有关公平与公正待遇条款的抗辩	107
三、有关保护伞条款的抗辩	111
四、有关重大安全例外条款的抗辩	112
第三节 仲裁后救济程序	120
一、申请暂停执行仲裁裁决	120
二、仲裁撤销程序	123
本章小结	127
第五章 阿根廷国际投资仲裁危机的实践（二）：国内法应对措施分析	129
第一节 阿根廷困境	129
一、阿根廷面临的困境	129
二、阿根廷官员与学者对 ICSID 体制的批评	130
第二节 阿根廷国内的争论	131
一、国会讨论	131
二、法院判例	132
三、学者意见	134
四、小结	136
第三节 ICSID 裁决在阿根廷的执行	136
一、《ICSID 公约》承认与执行仲裁裁决规则	136
二、阿根廷不执行 ICSID 裁决后果分析	140
三、阿根廷政府与投资者有关执行的争议	143
四、阿根廷可以采取的应对措施分析	146
本章小结	150

第六章 阿根廷国际投资仲裁危机对中国的启示	152
第一节 中国双边投资条约的规定	152
一、管辖权条款	153
二、条约序言	158
三、投资定义条款	159
四、投资待遇条款	161
五、征收条款	165
六、重大安全例外条款	166
第二节 中国双边投资条约应有的转型	168
一、管辖权条款	169
二、条约序言	170
三、投资定义条款	171
四、投资待遇条款	172
五、征收条款	174
六、重大安全例外条款	175
本章小结	176
结 论	179
参考文献	183
附 录	193

CONTENTS

Introduction	1
Subchapter 1 The background of the research	1
Subchapter 2 The object of the research	3
Subchapter 3 The status of the research	4
Subchapter 4 The significance of the research	6
Subchapter 5 The methods of the research	7
Subchapter 6 The frame and main contents of the research	8
Chapter 1 The summary of Argentina's international investment arbitration crisis	11
Subchapter 1 The system of the investment disputes settlement	11
Section 1 Diplomatic protection	12
Section 2 Inter-states investment arbitration	13
Section 3 International business arbitration	13
Section 4 International investment arbitration	15
Section 5 Brief summary	16
Subchapter 2 Argentina's investment arbitration crisis	16
Section 1 Argentina's economic crisis	16
Section 2 Argentina's investment arbitration crisis	17
Section 3 Brief summary	23
Subchapter 3 The background of Argentina's investment arbitration crisis	23
Section 1 The riddle of Argentina	23
Section 2 The mode of primary product export	24
Section 3 The mode of import substitution	26
Section 4 The mode of liberalization of economy	30
Summary	35
Chapter 2 The legal research of Argentina's investment arbitration crisis(I): Argentina's investment legal system	37

Subchapter 1	The research of Calvo Doctrine	37
Section 1	The background of Calvo Doctrine	38
Section 2	The main contents of Calvo Doctrine	41
Section 3	The effect of Calvo Clause	43
Section 4	Brief summary	45
Subchapter 2	Argentina's investment legal system	46
Section 1	Argentina's investment legal system in the early twenty's century	46
Section 2	Argentina's investment legal system in the Peron's period	47
Section 3	Argentina's investment legal system in the late twenty's century	48
Summary		53
Chapter 3	The legal research of Argentina's investment arbitration crisis(II):The study of Argentina's BIT	55
Subchapter 1	the research on the procedural clauses	55
Section 1	The jurisdiction clause	55
Section 2	The local remedy clause	61
Section 3	The legitimacy crisis of the investment procedural process	65
Section 4	Brief summary	70
Subchapter 2	the research on the substantial clauses	71
Section 1	The preamble	71
Section 2	The definition clause	73
Section 3	The treatment clause	75
Section 4	The expropriation clause	79
Section 5	The exception clause	81
Summary		83
Chapter 4	The legal practice of Argentina's investment arbitration crisis(I): the international counter-measures of Argentina	84
Subchapter 1	Defense to the procedural claims	84
Section 1	Objection to the jurisdiction	84

CONTENTS

Section 2	Objection to the arbitrator	93
Subchapter 2	Defense to the substantial claims	102
Section 1	Objection to the expropriation claims	103
Section 2	Objection to the fair and equitable treatment claims	107
Section 3	Objection to the umbrella clause claims	111
Section 4	Objection to the significant exception clause claims	112
Subchapter 3	the procedural remedy after arbitration	120
Section 1	The procedure of stay of enforcement of the award	120
Section 2	The procedure of annulment of the award	123
Summary	127
Chapter 5	The legal practice of Argentina's investment arbitration crisis(II): the inter-state counter measures of Argentina	129
Subchapter 1	The dilemma of Argentina	129
Section 1	The dilemma of Argentina	129
Section 2	The criticism to the ICSID system	130
Subchapter 2	The discussion in Argentina	131
Section 1	The discussion in the congress	131
Section 2	The precedent	132
Section 3	The suggestion of the scholars	134
Section 4	Brief summary	136
Subchapter 3	Enforcement of the ICSID awards in Argentina	136
Section 1	The regulation of acknowledgement and enforcement of the Washington Convention	136
Section 2	Possible consequence if Argentina does not enforce the awards	140
Section 3	The dispute between the investors and the Argentina government	143
Section 4	Possible legitimate inter-state counter measures Argentina may take	146
Summary	150
Chapter 6	Lessons China can learn from Argentina's international investment arbitration crisis	152

Subchapter 1	The research of China's bilateral investment treaties	152
Section 1	The jurisdiction clause	153
Section 2	The preamble	158
Section 3	The definition clause	159
Section 4	The treatment clause	161
Section 5	The expropriation clause	165
Section 6	The significant exception clause	166
Subchapter 2	The possible development of China's bilateral investment treaties	168
Section 1	The jurisdiction clause	169
Section 2	The preamble	170
Section 3	The definition clause	171
Section 4	The treatment clause	172
Section 5	The expropriation clause	174
Section 6	The significant exception clause	175
Summary		176
Conclusion		179
Bibliography		183
Appendix		193

Degree papers are in the "[Xiamen University Electronic Theses and Dissertations Database](#)". Full texts are available in the following ways:

1. If your library is a CALIS member libraries, please log on <http://etd.calis.edu.cn/> and submit requests online, or consult the interlibrary loan department in your library.
2. For users of non-CALIS member libraries, please mail to etd@xmu.edu.cn for delivery details.

厦门大学博硕士论文摘要库